Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC., AND THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON AND ERIC KNUDSON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED FOR REVIEW

1. This Court previously held in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), that "equitable relief," as used in 29 U.S.C. § 1132(a)(3), means those types of relief that were "typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." The Ninth Circuit held that enforcing a recoupment of benefits provision in a health plan violates this prohibition against seeking "compensatory damages" simply because recouping benefit payments involves a monetary payment. The Court therefore held that federal courts lack subject matter jurisdiction over actions brought by ERISA plan fiduciaries to enforce recoupment provisions. Did the Court err?

2. A court may not award attorney's fees under a federal statute unless the court has subject matter jurisdiction under that statute. The Ninth Circuit affirmed the district court's award of attorney's fees under ERISA to Respondent Janette Knudson despite the fact that the Ninth Circuit held that subject matter jurisdiction did not exist under ERISA. Did the Court err?

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties. There are no parent or publicly held companies that own 10% or more of the Petitioners' stock.

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OPINIONS BELOW

This action was initiated by Petitioners in the United States District Court for the Central District of California, and that court entered summary judgment in favor of Respondent Janette Knudson. The order granting Respondent's motion for summary judgment is reprinted in Appendix B.[1] There is no official citation to that order. The Petitioners moved for reconsideration of that order and Respondent Knudson moved for an award of attorney's fees under ERISA. The district court granted Knudson's motion for attorney's fees and denied Petitioners' motion for reconsideration. The order disposing of these motions is reprinted in Appendix C.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit, case number 98-56472, and that Court entered an opinion on February 7, 2000. The opinion is reprinted in Appendix D. The citation for the opinion is *Great-West Life & Annuity Insurance Company, et al. v. Knudson,* No. 98-56472, 2000 WL 145374 (9th Cir. Feb. 7, 2000).

Respondent Janette Knudson moved for attorney's fees under ERISA, and Petitioners filed a Suggestion for Rehearing *En Banc*. On March 22, 2000, the Ninth Circuit

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[1] The district court's order granting Respondent's motion for summary judgment should be read in conjunction with the district court's previous order granting Respondent's motion to remand a related state court action that was previously removed to federal court and, *sua sponte,* remanded to state court. Therefore, the district court's remand order is reprinted in Appendix A. There is no official citation to that order.

denied the Suggestion for Rehearing *En Banc*. On April 3, 2000, the Court denied Respondent Knudson's motion for attorney's fees under ERISA.

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the United States District Court for the Central District of California. The court entered summary judgment in favor of Respondent Knudson. Petitioners timely appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit entered its opinion on February 7, 2000. Petitioners filed a Suggestion for Rehearing *En Banc*, which was denied on March 22, 2000.

This petition is timely filed under Supreme Court Rule 13(1), and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rule 14(e), Petitioner provides the following specific information:

(i) Date the judgment or order sought to be reviewed was entered:

February 7, 2000, the date of the Ninth Circuit's opinion

(ii) Date of any order respecting rehearing/extension of time:

The Ninth Circuit denied Petitioner's Suggestion for Rehearing *En Banc* on March 22, 2000

(iii) Rule 12.5 considerations:

Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. § 1254(1)

(v) Rule 29.4 statement:

Not applicable

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

29 U.S.C. § 1132(a)(3):

(a) Persons empowered to bring a civil action

A civil action may be brought –

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan....

29 U.S.C. § 1132(g):

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

Janette Knudson and Eric Knudson were covered persons under the Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. Ms. Knudson was injured in an automobile accident. The Plan paid benefits to Ms. Knudson and/or her medical providers in the amount of $411,157.11 for her medical care. In 1993, Ms. Knudson sued the third parties allegedly responsible for her injuries in California Superior Court.

This case involves the interpretation of a specific Right of Recovery provision of the Plan, which entitles Earth Systems to recoup the benefits paid on behalf of Knudson if she recovers from third parties. That section of the Plan provides:

> A third party may be liable or legally responsible for expenses incurred by a covered person for an illness; or a sickness; or a bodily injury.
>
> When this happens we will, subject to all other terms and provisions of this booklet, pay any benefits which are payable for the expenses incurred by the covered person for the treatment of such illness, sickness or

> bodily injury (the loss).
>
> RIGHT OF RECOVERY. We will, at our sole option, have the right to recover from the covered person any payment for benefits paid for treatment of such loss under this booklet which the covered person is entitled to receive from a third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, the covered person receives from:
>
> > The third party;
> > or the third party's insurer or guarantor; or the covered person's uninsured motorists insurance.
>
> This lien will not exceed:
>
> > the amount of benefits paid under this booklet for the treatment of a loss; or
> >
> > the amount received by the covered person for such medical treatment from the third party.
>
> CONDITIONS:
>
> > The covered person must cooperate fully with us in asserting our right to recover. If the covered person: – makes any recovery as set forth in

this provision; and – fails to reimburse us fully for any benefits paid under this provision; then he will be personally liable to us the extent of such recovery up to the amount of the first lien.

Before any benefits are paid for the treatment of such loss under this booklet, we may require the covered person to provide all information and sign and return all documents necessary to exercise our rights under this provision.

After Ms. Knudson was injured, her husband signed a Right of Recovery Agreement on behalf of his capacitated spouse, which states:

> As a member of the above named Plan, I have made a claim for covered medical expenses under the terms of the Plan for myself or dependent for the injury/illness detailed above.
>
> * * *
>
> I request that benefits be paid at this time without the necessity of awaiting final determination of responsibility. . . .
>
> * * *
>
> I also understand that under the terms of the Plan, the Plan may recover from me any

> payments for benefits paid under this Plan for which I or my dependents may be entitled to receive from a third party. The Plan shall automatically have a first lien upon any recovery, whether by settlement, judgment or otherwise, that I or my dependant receives from another party, the other party's insurer or guarantor, or my own insurer or guarantor. Said first lien shall be for the amount of medical and hospital benefits paid by the Plan, I shall be personally liable to the Plan to the extent of such recovery up to the amount of its first lien. I agree to cooperate fully with the Plan in asserting its rights to recover.

After the Knudsons acknowledged their obligations, Earth Systems paid $411,157.11 in benefits on Ms. Knudson's behalf. If Eric Knudson had not signed the Right of Recovery Agreement, it was undisputed below that Knudson would not have received payment for her medical treatment.

As Knudson's third-party action progressed, her counsel and a representative of Great-West Life & Annuity Insurance Company,[2] Louis Tuccitto, discussed resolution of Petitioners' right of recoupment. Knudson's counsel was sent, on February 7, 1994, a copy of the Summary Plan Description containing the Right of Recovery provision. Knudson's counsel sent Great-West a letter on September 29, 1995, acknowledging Earth Systems' recovery rights: "This letter will acknowledge your lien in the amount of

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[2] Great-West is the third-party administrator for the Plan.

$411,157.11. . . ."

Despite this acknowledgment, Knudson's attorney sought a compromise of the lien. After learning from Knudson's attorney that Knudson was recovering $650,000 because of her injuries, Petitioners offered to reduce their lien by accepting $200,000 instead of $411,157.11, with Knudson's counsel accepting $200,000 as an attorney's fee, and the remaining $250,000 being paid to Knudson. Knudson's attorney refused.[3]

On March 27, 1997, after these efforts at compromise failed (and despite the previous "acknowledgments" by Knudson and her counsel), Knudson mailed to Great-West a motion to approve settlement in her third-party action, which was pending in California Superior Court. Knudson, however, did not serve Great-West (or Earth Systems) with a summons in that action. On April 22, 1997, Great-West removed to the United States District Court for the Central District of California the claims asserted against it based upon 28 U.S.C. § 1445(c) and the complete preemption doctrine under ERISA. On June 30, 1997, the district court *sua sponte* remanded those claims to state court because the court held that Great-West was not a party in the state court action.

On July 7, 1997, Petitioners filed the present action and served Ms. Knudson and her attorney. On July 9, 1997, the district court denied, based upon the Anti-Injunction Act, Petitioners' application for temporary restraining order.

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[3] Ultimately, Knudson's attorney received $373,426.00 of the $650,000.00 settlement.

On July 23, 1997, the California Superior Court approved the settlement of Knudson's state court action against the third parties allegedly responsible for her injuries. In that settlement, Knudson and her attorney collaborated with the state court defendants and agreed that Earth Systems' reimbursement amount of $411,157.11 was worth only $13,828.70. The settlement negotiated by the parties to the state court action allocated by agreement only $13,828.70 of the $650,000.00 settlement to past medical expenses. This agreement was reached despite the fact that Knudson, through her counsel, had previously acknowledged in writing that Earth Systems' lien based upon medical expenses was actually $411,157.11. Earth Systems (and the other Petitioners) were not parties to – and did not participate in – the state court action.

In December, 1997, Petitioners moved for summary judgment, moved for leave to file their Second Amended Complaint to add Jeffrey S. Pop and his law firm and Louise Curinga, Trustee of the Special Needs Trust, as defendants, and moved for preliminary injunction against the new parties. Knudson filed her cross-motion for summary judgment.

On May 20, 1998, the district court granted Knudson's motion for summary judgment and denied Petitioners' motion for summary judgment. Petitioners filed a motion for reconsideration. On July 10, 1998, the district court denied Petitioners' motion for reconsideration and granted Knudson's motion for attorneys' fees.

ARGUMENT FOR GRANTING THE WRIT

I. The Court should grant the petition to resolve a conflict among the federal courts of appeals and a decision of this Court over whether enforcing a recoupment provision in a health plan constitutes "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3).

A. The federal courts of appeals are split over whether enforcing a recoupment provision in a health plan constitutes "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3).

In reaching its decision in this case, the Ninth Circuit relied entirely upon its earlier decision in *FMC Medical Plan v. Owens*,[4] which ruled that federal courts do not have subject matter jurisdiction over 29 U.S.C. § 1132(a)(3) claims whenever the substance of the remedy is monetary. The decisions in *Knudson* and *Owens* directly conflict with reported cases from the Seventh, Eighth and Eleventh Circuits, which specifically reject the reasoning of *Owens*.[5]

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[4] 122 F.3d 1258 (9th Cir. 1997).

[5] *Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999); *Blue Cross and Blue Shield of Alabama v. Sanders*, 138 F.3d 1347 (11th Cir. 1998); *Southern Council of Industrial Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996).

In *Administrative Committee v. Gauf*,[6] the Wal-Mart Associates Health & Welfare Plan (the "Plan") filed suit against Wal-Mart employee Patricia Gauf seeking to compel reimbursement of benefits pursuant to a plan provision requiring reimbursement when employees obtain a third-party tort recovery for damages arising out of the medical condition for which the Plan previously paid benefits. As in the present case, the Plan sued under ERISA Section 502(a)(3) to obtain "other appropriate equitable relief . . . to enforce . . . the terms of the Plan."

Gauf argued that the Plan was, in effect, seeking a legal remedy because the ultimate purpose of the suit was to obtain reimbursement of money, and thus, its action could not lie under Section 503(a)(3). The Seventh Circuit rejected this argument, stating:

> Although the pertinent parts of the complaint employ a variety of terms to express the relief requested, we believe that a fair reading of the document in its totality makes clear that the Committee is seeking an equitable remedy against Ms. Gauf to insure her compliance with the terms of the Plan. For example, the complaint requests "specific performance and enforcement" of the contract and an "order enjoining defendant from continuing to violate the terms of the Plan."[7]

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[6] 188 F.3d 767 (7th Cir. 1999).

[7] *Id.* at 770.

In reaching its conclusion, the *Gauf* Court acknowledged the holding of *Owens* but wholly rejected it, stating that "our Circuit has consistently held that a complaint purporting to state a claim for equitable relief under a reimbursement clause in a benefits contract is an equitable claim for purposes of ERISA Section 502(a)(3)."[8]

The Eleventh Circuit also rejected the *Owens* decision in *Blue Cross and Blue Shield of Alabama v. Sanders*.[9] As in *Owens*, *Gauf*, and the present case, the action in *Sanders* arose out of a plan provision permitting the plan to obtain reimbursement in the event the participant obtained a tort recovery against a third party. As in *Gauf*, the defendants relied upon *Owens*' assertion that a reimbursement claim is an action for legal relief unavailable under 29 U.S.C. § 1132(a)(3).

The Eleventh Circuit squarely rejected this argument, stating that:

> *Owens* appears to be based on an unduly narrow reading of *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993). . . . The Court in *Mertens* did not imply that specific performance is unavailable under 29 U.S.C. § 1132(a)(3)(B).

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[8] 188 F.3d at 771, *citing Harris Trust & Savings Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995); *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Neurobehavioral Associates, P.A.*, 53 F.3d 172, 173-74 (7th Cir. 1995).

[9] 138 F.3d 1347 (11th Cir. 1998).

> Because specific performance is a traditional form of equitable relief, . . . we believe that specific performance may be equitable relief available under 29 U.S.C. § 1132(a)(3)(B).[10]

The Eighth Circuit, in *Southern Council of Industrial Workers v. Ford*,[11] upheld the right of a plan administrator to proceed under § 1132(a)(3) to enforce a subrogation provision and a written subrogation agreement. The plan administrator sought to compel a plan participant to reimburse the plan for medical expenses previously advanced out of proceeds gained from settlement of a personal injury claim. Holding that the allegation "that Ford admittedly failed to reimburse is a claim that Ford failed to comply with a term of the Plan," the Court found that the Plan's equitable action for unjust enrichment is permitted under ERISA Section 502(a)(3).[12] This holding, along with the decisions noted above from the Seventh and Eleventh Circuits, is directly at odds with the Ninth Circuit's *Owens* decision.

Other courts likewise have permitted actions for restitution or other equitable relief to proceed under ERISA Section 502(a)(3).[13]

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[10] *Id.* at 1352-53, n. 5. *See also In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 57 F.3d 1255, 1268-69 (3d Cir. 1995).

[11] 83 F.3d 966 (8th Cir. 1996).

[12] *Id.* at 969.

[13] *See, e.g., Health Cost Controls v. Isbell*, 139 F.3d 1070 (6th Cir. 1997); *LeBlanc v. Cahill*, 153 F.3d 134

B. The *Knudson* decision conflicts with this Court's decision in *Mertens*.

The *Knudson* panel relied solely upon *FMC Corp. v. Owens,* which conflicts with this Court's decision in *Mertens*.

In *Mertens*, this Court ruled that the 29 U.S.C. § 1132(a)(3) does not allow a suit by plan participants for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. This Court held that ERISA Section 502(a)(3)'s limitation of remedies to "appropriate equitable relief" means that "money damages" are not recoverable. The Court reasoned that "equitable relief," as used in 29 U.S.C. § 1132(a)(3), means those types of relief that were "typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[14]

This Court, in reaching its decision, however, did not bar equitable remedies which would ultimately result in a monetary recovery. This Court did not, for example, state that specific performance,[15] a traditional form of equitable

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(4th Cir. 1998); *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938 (5th Cir. 1998); *United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998); *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999); *Walker v. Rose*, 22 F. Supp. 2d 343 (D.N.J. 1998).

[14] 508 U.S. at 256.

[15] Mandamus–one of the forms of appropriate equitable relief enumerated by the *Mertens* Court–is the

relief,[16] is unavailable under 29 U.S.C. § 1132(a)(3)(B) simply because such a remedy may involve the recovery of money.

In addition, this Court ruled that "restitution" was among "those categories of relief that were typically available in equity. . . . " Other courts of appeals agree. For example, the Seventh Circuit, in *Harris Trust & Sav. Bank*

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equivalent of specific performance. Mandamus is defined as an "extraordinary writ which lies to compel performance of a ministerial act or mandatory duty where there is a clear legal right in plaintiff, a corresponding duty in defendant, and a want of any other appropriate and adequate remedy." Black's Law Dictionary 663 (6th ed. 1991).

[16] *See Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979) ("An action for specific performance without a claim for damages is purely equitable and historically has always been tried to the court."). Other courts and legal scholars have reached the same conclusion: *In re Unisys Corp. Retiree Med. Ben. ERISA Litigation*, 57 F.3d at 1268-69 (specific performance is an equitable remedy); *Fischer Imaging Corp. v. General Electric Co.*, 187 F.3d 1165, 1172 (10th Cir. 1999) (specific performance is an equitable remedy); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 660-61 (6th Cir. 1996) (holding that specific performance is an equitable remedy and "[i]t is well-settled that equitable relief includes monetary damages where required to afford complete relief"); Pomeroy, *A TREATISE ON EQUITY JURISPRUDENCE*, § 1401 (5th ed. 1941); Lawrence, *A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE*, §§ 255, 256 (1929).

v. Provident Life & Accident Ins. Co.,[17] held that an employer's claim for reimbursement of benefits pursuant to an employee benefit plan provision constituted an action for restitution, an equitable remedy available under §1132(a)(3). The Fourth Circuit, in *LeBlanc v. Cahill*,[18] held that restitution, seeking "to restore the fund to the position it held before," is a category of relief traditionally available in equity, and thus, "falls squarely within the Court's definition of 'appropriate equitable relief' as stated in ERISA Section 502(a)(3)."[19]

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[17] 57 F.3d 608, 615-16 (7th Cir. 1995).

[18] 153 F.3d 134, 153 (4th Cir. 1998).

[19] The Ninth Circuit, while recognizing "other appropriate equitable relief" available under § 1132(a)(3) includes restitution, held that "restitution," as used in § 1132(a)(3), means "ill-gotten gains." In other words, a claim for restitution would not lie unless the claimant was seeking to recover gains obtained through fraud or wrongdoing. 197 F.3d at 1005-7, *citing Owens*, 122 F.3d at 1261. The panel concluded that such circumstances did not exist in the present case because the "payment of Ms. Stone's medical bills by appellants was not obtained through fraud or wrongdoing" since "Cement Masons was required under the terms of the Plan to make those payments." *Id.* at 1007. The Ninth Circuit, in reaching this conclusion however, looked only at one side of the coin. While the plan participant's initial receipt of monies paid from the plan for medical expenses does not involve fraud or wrongdoing, the participant's subsequent failure to abide by *his* reciprocal obligation under the plan to reimburse the plan for benefits paid clearly results in "ill-gotten" gain–as defined by the Ninth Circuit–for the participant in the form of double recovery.

Monetary recoveries are commonplace in restitutionary actions and will not transform the nature of the remedy sought from an equitable into a legal one as the Ninth Circuit in *Owens* implied.[20]

In addressing this issue of "appropriate equitable relief" under ERISA Section 502(a)(3), this Court in *Mertens* explicitly analogizes the phrase "other appropriate equitable relief" to the similar language of Title VII of the Civil Rights Act of 1964, which includes the term "any other equitable relief the court deems appropriate . . . ."[21] Title VII authorizes equitable relief which includes the payment of money; for example, the Supreme Court has

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[20] *Schwartz v. Gregory*, 45 F.3d 1017 (6th Cir. 1995); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (holding that monetary recoveries are considered equitable when "they are restitutionary"); *Health Cost Controls v. Skinner*, 44 F.3d 535, 538 n. 4, 5 and 7 (7th Cir. 1995) ("although [plan administrator] clearly cannot recover compensatory damages under [§ 1132(a)(3)], if it successfully makes out a claim for restitution . . . it may be entitled to monetary relief"); *In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 57 F.3d at 1268-69 (equitable relief under Section 1132(a)(3) includes monetary awards typically available in equity, but not compensatory or consequential damages; granting retirees both specific performance of fiduciary's assurances of post-retirement benefits and restitutionary reimbursement of back benefits).

[21] 508 U.S. at 255.

authorized awards of both back pay and front pay (both monetary remedies) under Title VII, remedies which constitute "equitable relief."[22]

This Court recognized that "[m]oney damages are, of course, the classic form of legal relief."[23] In *Bowen v. Massachusetts*,[24] a case requiring analysis of the statutory exception in 5 U.S.C.A. § 702 denying district court review jurisdiction in actions against federal agencies seeking "money damages," this Court set forth the basic distinctions between an action for damages and an equitable action for specific relief. In particular, this Court held:

> The term money damages . . . normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." D. Dobbs, Handbook on the Law of Remedies 135 (1973).[25]

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[22] *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 398 (6th Cir. 1993) (front pay characterized as equitable).

[23] 508 U.S. at 255.

[24] 487 U.S. 879 (1988).

[25] *Id.* at 895, *quoting Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1411 (D.C. Cir. 1985).

Employee benefit plans, in attempting to recoup benefits paid on behalf of a plan participant in third-party tort recovery situations, are seeking nothing more than specific remedies. The type of relief typically sought by employee benefit plans in such situations includes specific performance, restitution and/or injunctive relief. In pursuing these remedies, plan fiduciaries seek solely to enforce plan provisions and recoup a specific amount of money that has already been paid out. Plan fiduciaries do not seek money damages in an effort to compensate the plan or substitute for payments made in the first instance. Instead, the employee benefit plans are seeking specific relief in these instances which would grant them the very thing to which they are entitled under their plan terms

The Ninth Circuit, relying upon *Owens*, denies employee benefit plans these specific equitable remedies, concluding that "when the substance of the relief is monetary, . . . such a remedy is not available under section 1132(a)(3)."[26] This holding clearly conflicts with this Court's holding in *Mertens* that mandamus, injunction, or specific performance, which clearly encompass monetary relief, are "appropriate equitable relief" within the meaning of 29 U.S.C. § 1132(a)(3).[27]

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[26] 122 F.3d at 1262.

[27] This Court did not hold that "injunction, mandamus, and restitution" are the *only* forms of appropriate equitable relief. On the contrary, this Court reasoned that "equitable relief," as used in 29 U.S.C. § 1132(a)(3), means those types of relief that were "typically available in equity (*such as* injunction, mandamus, and restitution, but not compensatory damages)." 504 U.S. at 256 (emphasis added). This Court was providing examples of equitable relief, not an exhaustive list as the *Owens*

The Ninth Circuit's decision effectively denies employee benefit plans the right to enforce subrogation and reimbursement provisions in situations where the ultimate recovery would include money. In so doing, the Ninth Circuit has stripped employee benefit plans of a valid and effective cost containment mechanism.

Employee benefit plans do not, as the Ninth Circuit suggested in *FMC v. Owens,* have the option of pursuing in state court claims to recoup medical expenses. In *Descant v. The Administrators of the Tulane Educ. Fund*,[28] for example, an employee benefit plan paid benefits on behalf of a covered person and moved to intervene in the covered person's state court action in order to enforce the plan's recoupment rights. The Louisiana Court of Appeals affirmed the trial court's decision to dismiss the employee benefit plan's petition in intervention because federal courts have exclusive jurisdiction to determine the recoupment rights of ERISA-covered plans:

> The issue of Canal Barge's right of subrogation is a matter to be decided under the federal ERISA statute, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101, *et seq.* Under ERISA, Congress explicitly set forth provisions granting federal district courts exclusive jurisdiction in civil actions brought by fiduciaries intending to enforce the terms of a benefit plan. 29 U.S.C. § 1132(a)(3)(B)(ii). Accordingly, the federal district court has

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panel ruled.

28 706 So. 2d 618 (La. Ct. App. 1998)

> exclusive subject matter jurisdiction to determine whether Canal Barge is entitled to reimbursement pursuant to a subrogation agreement.[29]

Similarly, in *Jefferson Pilot Life Ins. Co. v. Krafka*,[30] a third-party administrator of an ERISA-covered employee benefit plan sought to recoup benefits paid on behalf of a covered person after the covered person recovered from a third party for the same injuries that had been paid by the plan. The California Court of Appeals reversed the judgment granted in favor of the plan and ordered that the complaint against the plan be dismissed because federal courts have exclusive jurisdiction over recoupment actions brought by ERISA plan fiduciaries:

> . . . [T]he federal courts have exclusive subject matter jurisdiction of civil lawsuits under ERISA, except for actions under Title 29 of the United States Code, § 1132(a)(1)(B) and (a)(7); the state courts have concurrent jurisdiction in matters arising under those sub-divisions. Section 1132(a)(1)(B) and (a)(7) authorize actions, respectively: "by a participant or beneficiary . . . to recover benefits due to him [or her] under the terms of his [or her] plan, to enforce his [or her] rights under the terms of the plan, or to clarify his [or her] rights to future benefits under the terms of the plan" and "by a state to enforce compliance with a

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29 *Id.* at 627.

30 50 Cal. App. 4th 190 (1996).

> qualified medical child support order . . . ." Plaintiff is not a plan participant or beneficiary, nor is it a state. Therefore, plaintiff is not a proper party to bring an action in the state court under ERISA, § 1132(a)(1)(B) or (a)(7). In other words, any action plaintiff may be able to bring under ERISA is not a lawsuit as to which this court can exercise concurrent subject matter jurisdiction. In the absence of subject matter jurisdiction, plaintiff's complaint must be dismissed.[31]

Because of the Ninth Circuit's decision in this case and ERISA's bar against fiduciaries pursuing actions in state court to enforce plan terms, employee benefit plans have no recourse to recoup medical expenses in third-party liability situations except to exclude coverage for such expenses. This Court should grant the Petition and consider this case on the merits.

II. This Court should grant the petition to resolve a conflict among the federal courts of appeals and a decision of this Court over whether a court may award attorney's fees under a federal statute after finding that the court has no subject matter jurisdiction under that statute.

This Court, the Ninth Circuit, and every other Circuit that have addressed the issue has held that, if a court lacks subject matter jurisdiction under a federal statute, then the court has no authority to award attorney's fees under

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[31] *Id.* at 194-95.

that statute.[32] The *Knudson* decision conflicts with these decisions in holding that "[e]ven in the absence of subject matter jurisdiction, a district court has the power to award attorneys fees."[33] While the Court purports to rely upon prior authority from the Ninth Circuit for this proposition, the authority relied upon, *Moore v. Permanente Medical Group, Inc.*,[34] does not support the holding announced by the *Knudson* panel under the facts presented there.

In *Moore,* the defendant removed a case from state court to federal district court, and the district court granted the plaintiff's motion to remand to state court. After remand, the plaintiff moved for an award of attorney's fees for improper removal under 28 U.S.C. § 1447(c), which the court granted. The defendant appealed to this Court, contending that "because the fee award was not included in the district court's remand order, the district court did not have jurisdiction to award fees."[35]

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[32] *National Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 592 (1995) ("It follows that when no relief can be awarded pursuant to § 1983, no attorney's fees can be awarded under § 1988."); *Branson v. Nott*, 62 F.3d 287 (9th Cir. 1995); *W.G. v. Senatore*, 18 F.3d 60 (2d Cir. 1994); *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990).

[33] Addendum A, Ninth Circuit Opinion, p. A-4.

[34] 981 F.2d 443 (9th Cir. 1992).

[35] *Id.* at 445.

This Court rejected the defendant's argument based upon a Supreme Court decision, *Cooter & Gell v. Hartmarx,*[36] which holds that a federal court retains jurisdiction after a voluntary dismissal to rule on collateral matters that are "supplemental to the original proceeding, such as a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. In *Moore,* this Court held, consistent with *Cooter & Gell*, that a court retains jurisdiction after remand of a removed action to award attorney's fees for improper removal pursuant to 28 U.S.C. § 1447(c). This holding does not support the rule announced in the *Knudson* decision.

One decision from the Ninth Circuit, which was available to the *Knudson* panel, noted that the principle that allows a court to award Rule 11 sanctions, despite the fact that the court no longer has subject matter jurisdiction over the action, is distinguishable from the situation presented here. In *Branson,* this Court held that the absence of subject matter jurisdiction under a statute bars an award of attorney's fees under that statute. The *Branson* Panel pointed out the fallacy of the *Knudson* Panel decision by distinguishing a prior panel opinion from the Ninth Circuit, which "affirm[ed] dismissal of § 1983 action for lack of subject matter jurisdiction while also affirming district court's award of attorney's fees, where fees had been awarded under 42 U.S.C. § 1988 and, alternatively, under Fed. R. Civ. P. 11."[37] In *Branson*, as in the present case, there was no motion or ruling regarding Rule 11 sanctions. The district court premised its attorney's fee award solely upon ERISA.

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[36] 496 U.S. 384 (1990).

[37] *Branson,* 62 F.3d at 293.

A case that was decided eight days before the Ninth Circuit denied Petitioners' Suggestion for Rehearing *En Banc* provides additional support that *Knudson* was wrongly decided and conflicts with other decisions of the Ninth Circuit. In *In re Knight,*[38] the Ninth Circuit held that a district court, without subject matter jurisdiction under ERISA, could not award attorney's fees under ERISA.

CONCLUSION

The split among the circuits as to whether an employee benefit plan fiduciary may recoup benefit payments in third-party liability situations under ERISA Section 503(a)(3) threatens an important aspect of cost containment for employee benefit plans. The Ninth Circuit incorrectly interpreted this Court's decision in *Mertens* as barring claims under Section 503(a)(3) whenever the remedy involves a monetary recovery.

This Court should grant the Petition and resolve the split among the circuits, providing guidance on how to properly contain cost through the use of subrogation and reimbursement provisions, and reaffirm that a federal court, without subject matter jurisdiction under a federal statute, may not award attorney's fees under that statute.

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[38] 207 F.3d 1115 (9th Cir. 2000).

Respectfully submitted,

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Dated: May 8, 2000.

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, et. al., Plaintiffs-Appellants,

v.

Janette KNUDSON and Eric Knudson, Defendants-Appellees.

No. 98-56472.
D.C. No. CV 97-03745-JMI.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 13, 1999.

Decided Feb. 7, 2000.

Appeal from the United States District Court for the Central District of California, James M. Ideman, District Judge, Presiding.

Before B. FLETCHER, PREGERSON, Circuit Judges, and WEINER, [FN2] Senior District Judge.

FN2. Charles R. Weiner, Senior United States Judge for the Eastern District of Pennsylvania, sitting by designation.

MEMORANDUM [FN1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. Rule 36-3.

Great-West Life & Annuity Insurance Company ("Great-West"), Earth Systems, Inc. and the Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. appeal the district court's judgment adverse to them in their action seeking to enforce a contractual reimbursement provision pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) against Janette and Eric Knudson ("Knudson"). We affirm the district court's judgment but do so on grounds different from those relied on by the district court.

Defendants Eric and Janette Knudson were involved in an auto accident, which left Janette a paraplegic. At the time of the accident, she was covered by the Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. ("the Plan"). Following the accident, the Plan paid benefits totaling $411,157.11 to Knudson and her medical providers. The Plan includes a reimbursement provision giving the Plan a right to recover third party payments to Knudson up to the amount of the benefits paid by the Plan. The Plan also had a "Stop-Loss" insurance agreement with Great-West which gave Great-West the right to recover first any amounts reimbursing the Plan. Knudson was required also to execute an agreement to reimburse as a condition of receiving payments under the Plan.

Knudson filed suit in state court against Hyundai Motors and others allegedly responsible for the accident. The parties settled for $650,000. The state court ultimately approved the settlement and resolved the status of various competing lienholders to the settlement. [FN3] The settlement attributed five percent of the award to prior medical expenses. Knudson's attorney sent a check to Great- West for $13,828.70, representing 5% of the award. Rather than accept this amount, Great-West, Earth Systems, and the Earth

Systems Plan filed suit in federal district court claiming entitlement to $411,157.11 of the settlement.

> FN3. Prior to the state court's final approval of the settlement, Great- West removed the action to federal district court. The district court remanded to state court, noting that Great-West was never a party to the state court action. None of the issues surrounding the removal are before the panel in this appeal and neither party has appealed the state court ruling.

Ruling on cross-motions for summary judgment, [FN4] the district court held that the plain terms of the Plan limited the Appellants' reimbursement to the amount received by Plan beneficiaries from third parties for medical treatment. Because the state court oversaw the settlement and awarded Knudson only $13,828 for medical treatment, the district court simply acknowledged that the Appellants' right to reimbursement was limited to that amount. The court granted summary judgment in favor of Knudson. The district court also granted Knudson's request for attorneys fees in the amount of $80,497.50.

> FN4. Motions for preliminary injunction, disqualification of counsel, the striking of the jury demand, for judicial notice, and to file an amended complaint were also before the district court judge. In this appeal, Great- West has not challenged the district court's rulings with respect to the motions.

ERISA provides fiduciaries an exclusive forum in federal courts to enforce provisions of an ERISA plan. See 29 U.S.C. § 1132(e)(1). The Appellants seek to bring an action under 29 U.S.C. § 1132(a)(3) which requires that they be seeking equitable, rather than legal relief. We held, in FMC Medical Plan v. Owens, 122 F.3d 1258, 1262 (9th Cir.1997),

that reimbursement of payments made to a beneficiary of an insurance plan by a third party, which Appellants seek here, is not equitable relief within the meaning of § 1132(a)(3). [FN5]

Appellants contend that Owens was wrongly decided and seek en banc review. However, we have recently reaffirmed the holding in Owens and, therefore, decline to seek en banc review. See Reynolds Metals Co. v. Robert Ellis, ____ F.3d ____ (9th Cir.2000).

FN5. Owens rests its dismissal on the lack of subject matter jurisdiction. But see Cement Masons Health and Welfare Trust Fund for Northern California v. Stone, 197 F.3d 1003, 1008 (9th Cir.1999) (reaffirming the substantive holding in Owens but dismissing on the merits rather than on subject matter jurisdiction). For our purposes, in evaluating the substantive holding of Owens requiring the dismissal of reimbursement claims for third party settlements under ERISA, the dismissal could be based either on lack of subject matter jurisdiction or on the merits.

We also affirm the district court's award to Knudson of attorneys fees in the amount of $80,497.50. [FN6] Even in the absence of subject matter jurisdiction, a district court has the power to award attorneys fees. See Moore v. Permanente Medical Group, Inc., 981 F.2d 443 (9th Cir.1992).

FN6. Appellants challenge the right to attorneys fees, not the amount.

Accordingly we affirm the district court's judgment. AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, *et al.*,	)	CV 97-3745 JMI (Jgx)
Plaintiffs,	)	ORDER GRANTING PLAINTIFFS' MOTION TO REMAND
v.	)	ORDER REMANDING ACTION TO LOS ANGELES SUPERIOR COURT
JANETTE KNUDSON, *et al.*,	)	
Defendants.	)	

IT IS HEREBY ORDERED:

Plaintiffs Janette Knudson, et al.'s Motion to Remand came before this Court for review on June 2, 1997. After careful consideration and review, the Court hereby GRANTS Plaintiffs' motion.

BACKGROUND

Plaintiff, Janette Knudson, was involved in an automobile accident while driving a car manufactured by Hyundai Motors of America, Inc. Plaintiffs filed suit against Hyundai Motors of America, et al., in the Superior Court of the State of California for the County of Los Angeles. See Janette Knudson, et al. v. Hyundai Motors of America, Inc., et al.; Case No. LC022329. The dispute between Plaintiffs and Hyundai was to be settled by way of the establishment of a trust fund for Plaintiff.

Great-West Life and Annuity Insurance Company ("Great-West") is the assignee of the health insurance company that initially paid Plaintiff's medical expenses following the accident. Great-West, claiming to be a defendant, removed Plaintiffs' case against Hyundai, et al., to federal court before the trust fund could be approved by the state court. Now, Plaintiffs request that the case be remanded back to state court.

DISCUSSION

I. Section 1441 Procedure

Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant to the district court of the United States for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441. *Accordingly, only a defendant has the power to remove a case to federal court.*

II. Great-West Does Not Qualify as a Defendant Under 28 U.S.C. § 1441.

Great-West is a party-in-interest in the instant case to the extent that it hopes to receive compensation from the trust fund for the medical payments it made following Plaintiff's accident. Great-West, however, was never included as a party in Knudson v. Hyundai, and it is in no position to qualify itself as a defendant. Not Plaintiffs, nor any other party in this matter, have made any claims against Great-West. It is Great-West that has a complaint against Plaintiffs. In fact, Great-West has already filed a separate complaint in this court seeking compensation from Plaintiffs. See Great-West Life &

Annuity Ins. Co. v. Janette Knudson, et al.; CV 97-3745 JMI (JGx).

Plaintiffs have filed a Motion for Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors. In the motion, Plaintiffs ask the state court to approve the settlement reached with Hyundai. The proposed settlement includes a provision providing compensation to parties for past medical expenses. Great-West, however, does not qualify as an adversarial party in the motion. Great-West is only a party-in-interest to the extent that it is to receive compensation from the trust fund as part of the provision providing compensation to parties for past medical expenses. The state court is to decide whether or not the settlement is fair to the parties involved. If the state court finds that the proposed settlement is not fair to Great-West, it will not approve the settlement. Great-West is not in a position to itself oppose Plaintiffs' motion for approval.

III. Great-West Does Not Qualify as a Defendant Under Fravel v. Stankus

Great-West claims that it qualifies as a defendant under the holding in Fravel v. Stankus, 936 F. Supp 474 (N.D. Ill. 1996), a case from the Northern District of Illinois. In Fravel, the injured plaintiff filed a Motion to Adjudicate Lien against a subrogee of a health plan that had made medical payments on behalf of the plaintiff. Id. at 476. The motion was made in connection with a settlement the plaintiff reached with the defendant in the case. The court held that the health plan subrogee qualified as a defendant in the plaintiff's state case because "the action [was] clearly adversarial in nature." Id. at 480 (citation omitted).

The holding in Fravel, however, does not apply to the instant case. Plaintiffs never filed a Motion to Adjudicate Lien against Great-West. In fact, Plaintiffs dispute Great-West's contention that a lien ever existed. See Plaintiffs' Motion, p. 4.

IV. Great-West has Filed a Separate Complaint Against Plaintiff

Plaintiffs' Motion to Remand is strengthened by the fact that Great-West has already filed a separate ERISA related complaint against Plaintiffs in federal court seeking compensation for the payments it made relating to Plaintiff's accident. See Great-West Life & Annuity Ins. Co. v. Janette Knudson, et al.; CV 97-3745 JMI (JGx). It would be improper to allow Great-West to file a separate complaint against Plaintiffs for compensation and at the same time qualify itself as an adverse party in Plaintiffs' case against Hyundai. Such an outcome would not be in the interests of justice, as Great-West would be seeking compensation for the same expense from two separate sources. By filing a separate federal complaint, Great-West has mooted its argument for removing Plaintiffs' case against Hyundai.

IT IS SO ORDERED

DATED: June 27, 1997

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JAMES M. IDEMAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, *et al.*,	)	
Plaintiffs,	)	CV 97-3745 JMI (Jgx)
v.	)	
JANETTE KNUDSON, *et al.*,	)	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY
Defendants.	)	JUDGMENT

IT IS HEREBY ORDERED:

The following motions came before the Court on March 23, 1998:

Plaintiff's Motion For Summary Judgment;
Plaintiff's Motion For Preliminary Injunction;
Plaintiff's Motion To Disqualify Defendant's Counsel;
Plaintiff's Motion To Strike Defendant's Jury Demand;
Plaintiff's Motion To File Second Amended Complaint;

Defendant's Request For Judicial Notice;
Defendant's Motion For Summary Judgment.

Pursuant to Federal Rule of Civil Procedure 78 and Central District of California Local Civil Rule 7.11, the Court dispensed with oral argument on the motions, and Court took

the motions under submission. After careful and exhaustive review, considering all pertinent papers on file, the arguments, and materials presented by the parties, the Court hereby takes judicial notice of requested documents, GRANTS Summary Judgment in favor of Defendants, and DENIES the remaining motions.

BACKGROUND

This action arises under the Employee Retirement Income Security Act of 1974 ("E.R.I.S.A."), codified at 29 U.S.C. § 1001 et. seq. Plaintiff Great-West Life & Annuity Insurance Company ("Great-West") is the assignee for collection of the health and welfare plan for employees of Earth Systems, Inc. ("Earth Systems"). Defendants are Janette and Eric Knudson, husband and wife. Mr. Knudson was an employee of Earth Systems when he and his wife were involved in an automobile accident which left Mrs. Knudson a quadriplegic for life.

The Health and Welfare Plan for Employees of Earth Systems ("The Plan") paid out $411,157.11 in medical benefits for Janette Knudson's medical care. The Plan had a "Stop-Loss" insurance agreement with Great-West, whereby the Plan would pay any benefits up to $75,000 and Great-West would pay any excess amount. Additionally, the stop-loss allowed Great-West the right to recover first from amounts paid to the Plan by third parties. The stop-loss limits the Plan's risk of dissipating all of its assets for a single member.

Defendants in 1993 sued Hyundai Motors of America, and others, in L.A. Superior Court. Though Plaintiff Great-West was the assignee with rights of subrogation on an E.R.I.S.A. funded policy, it did not at any time seek to intervene in that action. Instead, when the Knudsons and

Hyundai agreed on a $650,000.00 settlement and notified Great-West that the Superior Court would rule on the fairness of the settlement and status of liens on the settlement, Great-West removed that case to federal court (Knudson, et al. v. Hyundai Motors of America, Inc., et al.), CV 97-2801 JMI (ANx)). This Court remanded that case because Great-West, a non-party in that action, had no right to remove the case.

At the same time, Plaintiffs filed the instant action (probably to hedge their bets against remand in the other case). Plaintiff Great-West alleges that it is entitled to $411,157.11 of any settlement proceeds because it paid out that amount in plan benefits to pay for medical expenses. Because the E.R.I.S.A. plan provided for first-lien reimbursement of medical expenses recovered from third parties, Plaintiff Great-West argues that it is entitled to injunctive relief.

Following remand, the Superior Court considered the fairness of the settlement and the status of creditors' liens on settlement funds. The settlement agreement, which provided $650,000.00 to the Knudsons, allocates damages as follows:

Loss of Earnings	5%
Past Medical Expense	5%
Future Medical Expense	45%
Loss of Enjoyment of Life; Distress; Long-Term Disability	40%
Other	5%

Because past medical expenses reflect only five per cent of the settlement amount, Plaintiff Great-West was not entitled to full subrogation under the settlement agreement. By Orders on July 23, 1997 and August 1, 1997 the Superior Court approved the settlement and directed payment of funds

to the Janette Knudson Special Needs Trust and to disputed creditors. Under the authorized settlement, Knudson's attorney sent a check to Great-West for $13,828,70, five percent of the settlement. Great-West did not cash the check, but requested that Knudson's attorney segregate all of the settlement funds pending the outcome of the present case in Federal Court. Knudson's attorney refused because monies had gone directly from Hyundai to the Knudson Special Needs Trust. Plaintiff's Motion for injunctive relief seeks segregation of the disbursed funds and attorney's fees.

ANALYSIS

The Court decides the motions in the following order because the ruling on certain motions obviate the need to consider the remaining motions:

I. Defendant's Request for Judicial Notice;
II. Cross Motions For Summary Judgment;
III. Plaintiff's Motion To Strike Defendant's Jury Demand;
IV. Plaintiff's Motion For Preliminary Injunction;
V. Plaintiff's Motion To Disqualify Defendant's Counsel;
VI. Plaintiff's Motion For Leave To File a Second Amended Complaint;

I. Defendant's Request for Judicial Notice

Defendant Janette Knudson requests that the Court take judicial notice of certain pleadings and orders in Knudson v. Hyundai, Los Angeles County Superior Court Case No. LC 022329 and District Court Case No. 97-2801 JMI (ANx) (while removed and prior to remand). Federal Rule of

Evidence 201 allows a court to take judicial notice of pleadings, orders, and decisions by the same or other courts. See Papai v. Harbor Tug and Barge Co., 67 F.3d 203 (9th Cir. 1995).

This Court takes judicial notice of the documents associated with motions and orders approving settlement in Superior Court and the file compiled while the case was removed to this Court.

The Court does not expressly rule on the parties' evidentiary objections. However, the Court thoroughly considered each, where pertinent, and disregarded inadmissible evidence. The Court did not base its conclusion on evidence that the Court would deem inadmissible at trial. Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 (9th Cir. 1990).

II. Cross Motions for Summary Judgment

Preemption and Exclusive Jurisdiction Under ERISA.

Defendant Janette Knudson was a "Covered Person" under the Plan. The parties agree that ERISA preempts the substantive state law governing this action. Plaintiffs, however, maintain that ERISA also gives the federal courts exclusive jurisdiction over this dispute, and that the Superior Court lacked subject matter jurisdiction to determine lien rights as defined by the Plan. Further, Plaintiffs argue that they could not pursue their claims for reimbursement in the state court because federal courts have exclusive jurisdiction over actions where a plan seeks equitable relief.

The ERISA statute defines the scope of jurisdiction over ERISA disputes: "State courts of competent jurisdiction

and district court of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section." 29 U.S.C. § 1132(e)(1). Paragraph (1)(B) states that a beneficiary may bring a civil action "to enforce rights under the terms of the plan." 29 U.S.C. 1143(a)(1)(B). The state court action to determine the status of liens on Janette Knudson's recovery is an action to enforce her rights under the terms of the Earth Systems Plan.

Plaintiffs note that "State courts have concurrent jurisdiction over ERISA claims only if the claim is one by a participant against a plan where the participant is seeking to recover benefits under 29 U.S.C. § 1132(a)(1)(B)." Plaitniff's Points and Authorities, at p. 3 n. 2 (emphasis added). Plaintiffs misstate the law. The concurrent jurisdiction includes more than "only" what Plaintiffs allege. See Schwarzer, et al., Cal. Prac. Guide: Fed. Civ. Pro. Before Trial § 2:38 (TRG 1998) (citing Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 (1983)). The statute clearly states that concurrent jurisdiction includes actions to recover benefits, to enforce rights under the terms of the Plan, and to clarify future benefits.

Plaintiffs correctly state that the federal courts have exclusive jurisdiction over an ERISA case seeking injunctive relief. 29 U.S.C. 11342(e)(1). Plaintiffs seek injunctive relief in this Court but never intervened in the state court action. The fact that Plaintiffs might have sought injunctive relief, does not deprive the state court of jurisdiction to enforce legal rights under the plan. Likewise, the fact that Plaintiffs may have mistakenly thought the state court lacked jurisdiction, does not strip that court of jurisdiction.

Therefore, the Court finds that the Superior Court had subject matter jurisdiction to determine the status of liens on

Knudson's recovery.

Standard for Summary Judgment

A motion for summary judgment provides a procedure for terminating without trial actions in which "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the moving party's burden to show the district court that there is an absence of essential evidence to support the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The court must view the evidence presented in the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Id. at 249-255.

The Plan's Reimbursement Rights

Plaintiff claims that the terms of the Plan provide for full, first lien, reimbursement to the extent of benefits paid from amounts recovered by the covered person from third parties. Based on this reading of the Plan, Plaintiffs contend that Knudson should have to pay the first $411,157.11 of any recovery to Plaintiffs. Plaintiffs state that a covered person's allocation of settlement funds is irrelevant to the determination of reimbursement rights where a benefit plan defines the scope of those rights.

Defendant Knudson argues that the Plan expressly limited Plaintiffs recovery to the amount paid out for medical expenses. Because the settlement allocated 5% of the total recovery for past medical expenses, Defendant refuses to pay more than the five percent less attorneys fees.

The Earth System Plan states that the Plan will pay benefits to covered party, even when a third party may be liable, but reserves a right of recovery as follows:

> "We will, at our sole option, have the right to recover from the Covered Person any payment for benefits paid for treatment of such Loss under this Booklet which the Covered Person is entitled to receive from the third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, that the Covered Person receives from . . . [third parties].
> The lien will not exceed:
> -the amount of benefits paid under this Booklet for the treatment of Loss; or
> -the amount received by the Covered Person for such medical treatment from the third party."

Exhibit B to Plaintiff's Motion for Summary Judgment.

The Right of Recovery Agreement Signed by Eric Knudson

In addition to the terms of the Plan, the Plan required that Eric Knudson sign a "Right of Recovery Agreement" prior to the Plan paying any of Janette Knudson's medical bills. See Exhibit 16 to combined motions. Unlike the terms of the Plan, the Agreement states that the Plan will have the right to reimbursement from "any" third party recovery and an automatic first lien.

The Agreement contains a number of flaws that render it useless for the purposes of the motions presently before the Court. First, the Agreement clearly misstates the rights as

established by the Plan. Second, the Agreement purports to be made in consideration of the Plan paying benefits under the Plan. The Plan cannot use a preexisting obligation as consideration for a later contract. Finally, the term of the Plan, itself, forbid alteration of the obligations without formally amending the official Plan documents. A plan administrator cannot amend a plan to divert resources from a beneficiary to the employer. Jacobson v. Hughes Aircraft Co., 105 F.3d 1288, 1292 (9th Cir. 1997). Because the Right of Recovery Agreement misstates the terms and obligations of the Plan, it is appropriate that the Court disregard the Right of Recovery Agreement in determining Plaintiffs rights under the Plan.

Interpretation of the Plan

The terms of the Plan authorize the Plan Administrator to interpret the language of the Plan. Courts will not upset the administrator's interpretation of an ERISA plan unless the interpretation is arbitrary and capricious. Canseco v. Construction Laborers Pension Trust for Southern California, 93 F.3d 600, 606 (9th Cir. 1996). In this case, Jerol Brown, an employee of Earth Systems, was vented with the authority to interpret the Plan. Mr. Brown interpreted the Plan to allow the Plan through Great-West, as the stop loss carrier, to be reimbursed 100% of any third party recovery. Based on Mr. Brown's interpretation, Great-West, the Plan, and Earth Systems seek to recover all of the $411,157.11 for Defendant's settlement with Hyundai. An interpretation of a plan which imposes additional terms which clash with the terms of a plan is considered arbitrary and capricious. Id. Mr. Brown's interpretation of the Plan clashes with the terms of the Plan. A reviewing court should not defer to an interpretation of the plan that is flawed. Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317, 1323 (9th Cir. 1995).

The terms of the Plan are abundantly clear in providing for a first lien and limits of reimbursement. Under the facts of the present case, the Plan is limited to recovering no more than the amount of benefits paid out or the amount received from a third party for medical treatment. Therefore, Plaintiffs may recover the lesser of, the $411,157.11 or the portion of the $650,000 that is attributable to medical expenses.

Since the Superior Court had proper jurisdiction and concluded that five percent of the settlement is attributed to Plaintiffs' lien, that matter is resolved.

Therefore, Defendant are entitled to summary judgment finding that five percent of the settlement is allocated to medical expenses.

III. Plaintiff's Motion to Strike Defendant's Jury Demand

The present claim is brought under the ERISA statute, which has been construed not allow for a jury trial. Spinelli v. Gaughan, 12 F.3d 853, 857 (9th Cir. 1993) at § 16.45. The right to a jury trial in federal court is a matter of federal law. In this case, where the statutory remedy is more analogous equity, the parties are not entitled to a jury trial. See Id.

The Court finds it unnecessary to strike the jury demand in light of the ruling on summary judgment.

IV. Plaintiffs' Motion for Preliminary Injunction

Plaintiffs seek a preliminary injunction to prevent Knudson, her attorney, and the trustee of the Janette Knudson Special Needs Trust from dissipating settlement funds before Plaintiffs are able to obtain a final ruling in the present suit.

The Court denies this motion in light of the ruling on summary judgment.

V. Plaintiff's Motion to Disqualify Defendant's Counsel

Plaintiffs move to disqualify Jeffery S. Pop, and the law firm of Jeffrey S. Pop & Associates (collectively "Pop") from representing Defendant Knudson in this action because a conflict of interest exists. Under the terms of Knudson's insurance policy, Plaintiff's have a lien on the proceeds of her personal injury settlement. Pop acknowledged the lien in a letter to Plaintiffs in September 1995. Plaintiffs reason that by acknowledging the lien and then distributing the settlement proceeds as ordered by the Superior Court, Pop created some sort of conflict of interest.

Plaintiffs do not adequately explain their allegations of multiple representation and conflict of interest. The California Bar Rules require written disclosure to a client when the bar member's relationships or interests will affect the representation of the client. See California Bar Rules, Professional Conduct Rule 3.31(B). There is no evidence that the mere existence of a lien creates such a relationship. Even if such a situation was created by the facts of this case, the Rules would merely obligate Pop to provide written disclosure.

Plaintiffs further allege that Pop's contingent fee agreement creates a conflicting financial interest. The fee agreement is itself a written disclosure, resolving any potential conflict.

The motion appears meritless.

VI. Plaintiff's Motion For Leave to File Second Amended Complaint

The Court denies this motion in light of the ruling on summary judgment.

CONCLUSION

Summary Judgment is hereby GRANTED in favor of Defendants.

The Court adopts the stipulation of facts between the parties filed on February 13, 1998.

The Court finds law and facts as stated above. Additionally, the Court adopts Defendants' Statement of Law and Facts lodged on February 2, 1998. The Court strikes the following findings because they are either unsupported or unnecessary in the resolution of the present motions:

Uncontroverted facts 2, 15, and 28;

Conclusions of law 4, 5, 7, 10, 13, 14, and 15.

IT IS SO ORDERED.

DATED: May 14, 1998.

JAMES M. IDEMAN
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, *et al.*,	)	
Plaintiffs,	)	CV 97-3745 JMI (Jgx)
v.	)	ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY FEES
JANETTE KNUDSON, *et al.*,	)	
Defendants.	)	ORDER DENYING RECONSIDERATION

IT IS HEREBY ORDERED:

The following motions came before the Court on July 6, 1998:

Plaintiff's Motion For Reconsideration; and
Defendant's Motion For Attorney Fees.

Pursuant to Federal Rule of Civil Procedure 78 and Central District of California Local Civil Rule 7.11, the Court dispensed with oral argument on the motions, and the Court took the motions under submission. After careful review, considering all pertinent papers on file, the arguments, and materials presented by the parties, the Court hereby DENIES reconsideration and GRANTS $80,497.50 in attorney fees.

BACKGROUND

Defendant, Janette Knudson was rendered quadriplegic in an automobile accident. Plaintiff, Knudson's insurance carrier, paid out over $411,000 in medical benefits and had a lien against any recovery of medical expenses obtained by Defendant from a responsible third party. Defendant obtained a settlement of $650,000 from an automobile manufacturer in Superior Court. The Superior Court allocated only 5% of the settlement to past medical expenses.

This Court entered summary judgment for Defendant, enforcing the Superior Court's allocation against the Plaintiff. Plaintiff seeks reconsideration of that ruling and Defendant seeks attorney's fees as authorized under ERISA.

DISCUSSION

I. AWARD OF ATTORNEY FEES

This Court has discretion to award attorney's fees to either party in any action brought under ERISA. ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1). The Court may, in its discretion, award attorney fees to a prevailing ERISA plan participant. Sokol v. Bernstein, 812 F.2d 559, 560 (9th Cir. 1987). The parties agree that the Court should broadly look to five primary factors to determine whether award of attorney's fees is appropriate. Hummell v. S.E. Rykoff & Co., 634 F.2d 446 (9th Cir. 1980). The factors set forth in Hummell are: (1) the degree of culpability or bad faith by the opposing party; (2) the ability of the opposing party to pay the award; (3) whether the award would deter future similar action by the opposing party; (4) whether plaintiff sought to benefit all ERISA participants or resolve a significant legal question; and (5) the relative merits of the parties' positions. Here, all

factors, except the fourth factor, counsel in favor of awarding attorney fees to Defendant. The fourth factor is not directly relevant because Defendant did not bring this action. Therefore, the Hummel method of analyzing ERISA fees supports Defendant's requests for $80,497.50 in fees.

II. DOCUMENTATION AND ADJUSTMENT OF FEES

Kerr v. Screen Extras Guild, Inc. stands for the principle that trial courts have discretion in awarding fees, and that the courts shall consider certain factors in exercising that discretion. 526 F.2d at 70. The guidelines are just that - guidelines. The prevailing party is not required to ritualistically mention every Kerr factor, especially when many of them do not apply to the case. The relevant factors in this case are: time, labor, and skill required; novelty and difficulty of issues; preclusion of other employment due to time limitations imposed by circumstances; type of fee and the customary fee; the undesirability of the case; the amount involved and the results obtained in the case; and fee awards in similar cases. See id. The amount of fees appears reasonable in light of the relevant factors and circumstances.

Defendant provided detailed information regarding the experience levels of counsel, their billing rates, specific information pertinent to this case, and extensive billing records. One of Defendant's attorneys, Jeffrey S. Pop charged $250 per hour, and the other attorney, Richard MacNaughton, charged $300 per hour. Pop billed 189.15 hours and MacNaughton billed 110.7 hours for a grand total of $80,497.50.

Plaintiff complains that the attorneys charge a premium for rather simple work, and that both attorneys bill for completing what appears in the records to be the same task.

Plaintiff fails explain which particular charges were duplicative and does not show that the rates charged are unreasonable in light of the complexity of issues presented.

A review of the records supplied as exhibits to declarations shows that Defendant's attorneys billed some large blocks of time in preparing and reviewing briefs for motions and cross-motions. Ordinarily, this might give the Court pause. However, the motions in this case were factually, procedurally, and legally complex. In fact, the final dispositive motion combined seven separate and distinct motions. The moving papers, exhibits, and court-generated research filed two banker's boxes. Due to the complex nature of the suit and the lack of particular objections to individual charges, the award of fees as requested is appropriate.

III. CONTINGENCY MULTIPLIER

In exceptional cases, the court may take the reasonable attorney fees and increase them by a multiple to account for various factors, including the risky contingency nature of the fee agreement. The Ninth Circuit has held that district courts do not have discretion to apply a multiplier to increase statutory attorney fees for contingency risk in ERISA cases. Cann v. Carpenters' Pension Trust Fund, 989 F.2d 313, 317-18 (9th Cir. 1993).

Consequently, Defendant is not entitled to a multiple increase in fees.

IV. STANDARD FOR RECONSIDERATION

A Motion for Reconsideration may be granted only on the grounds of: (1) a material difference in fact or law from that presented to the court that in the exercise of reasonable

diligence could not have been known to the party moving for reconsideration at the time of decision; (2) the emergence of new material facts or a change of law occurring after the time of decision; or (3) a manifest showing of a failure to consider material facts presented to the Court previously. C.D. Cal. R. 7.16.

Parties may request a court to reconsider an order granting a motion for summary judgment by a motion pursuant to Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. Fuller v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991). Rule 59(e) provides that a motion to amend or alter is proper where the motion is necessary to correct manifest errors of law or fact upon which the judgment is based or to prevent manifest injustice. 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 2810.1 at 125-26.

Plaintiff's present motion and arguments focus primarily on issues that were fully briefed, considered, and decided in the motion. The briefs do not rely on law or facts that were not presented previously and Plaintiff has made no showing that manifest injustice impends.

Having fully considered the briefs, the Court find insufficient basis, under the above standards, to reconsider this Court's grant of summary judgment.

CONCLUSION

The Court hereby DENIES reconsideration of the Order granting summary judgment. The Court hereby GRANTS Defendant's motion for $80,497.50 in attorney fees pursuant to 29 U.S.C. § 1132(g)(1).

IT IS SO ORDERED.

DATED: July 9, 1998

James M. Ideman
United States District Judge